

access, as discussed in ¶ 40. Staff reiterated its recommendation to modify the build-out plan from five years to two years. Staff recommended the Commission retain the annual mapping requirement and the quarterly reports of service requests for RCC and ALLTEL and extend it to all competitive ETCs, reminding the Commission that incumbent local exchange carriers are required to file maps of their service areas. Staff suggested the Commission direct it to revise the annual certification form to conform to decisions in this Order.<sup>117</sup>

56. The Commission has already addressed most of the FCC's reporting requirements, but addresses them briefly again because the Order Opening Docket requested Comments on some potential designation requirements in more than one context and parties responded correspondingly. The Commission finds it appropriate to adopt the FCC's requirements for annual certification for all carriers, but consistent with our decision in ¶ 42, we do not adopt the requirement that competitive ETCs acknowledge the possibility that they might need to provide equal access at some indefinite time in the future. We also find, as we did in ¶ 29, that ETCs shall file a two-year plan, not a five-year plan. The Commission agrees with Staff that it is useful to have ETCs submit maps of their service areas. Having access to service area maps facilitates decisions on complaints and enables the Commission to respond to inquiries promptly. Maps also demonstrate how companies spend their universal service support to expand their network. This is particularly helpful with competitive ETCs that do not have carrier of last resort obligations. The Commission notes that K.A.R. 82-12-7(b) requires utilities, as defined in K.S.A. 66-104, that own one or more telecommunications supply lines to

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<sup>117</sup> Report, p. 34.

annually file "a map or maps showing routes for all of its existing telecommunication supply lines." The maps require considerable detail in that they must indicate:

- (1) any specific additions or changes to the telecommunication supply lines in the calendar year;
- (2) whether lines are toll, interexchange or local exchange lines;
- (3) whether lines are constructed of fiberoptic, copper or other material;
- (4) whether lines are analog or digital; and
- (5) the location of microwave towers.

Thus all wireline carriers that have telecommunications supply lines, defined in K.A.R. 82-12-1(h) as "any overhead or underground transmission or distribution line for telecommunication transfer[.]," are required to file maps annually. The Commission notes the FCC requires maps to be filed annually for five-year service quality improvement plans by ETCs designated by it and this Commission finds access to such maps useful. It makes sense that all ETCs file facilities maps with the Commission. As determined in ¶ 29, the Commission retains the requirement to file annual maps for those wireless ETCs on which it has already been imposed and extends it to all other wireless ETCs. ETCs that have not filed maps shall do so within 90 days of the date of this Order. The Commission also reminds Staff to monitor that all companies file an annual map. All maps should be filed by December 31, this year. In the future, competitive ETCs shall file maps as part of their annual certification. Entities filing pursuant to K.A.R. 82-12-1 shall file annually on December 31. If no changes have occurred since a company's last filing, a letter so indicating is sufficient.

57. The Commission addressed the need for ETCs to certify their ability to function in emergency situations in ¶ 36. ETCs need to provide the detailed outage information specified by the FCC to enable the Commission to determine how ETCs function in emergency situations. In ¶ 39, the Commission required compliance with the

CTIA Code for wireless ETCs and adopted the requirement to report the number of complaints per 1000 handsets. Finally, the Commission directs Staff to revise the annual ETC certification form in accordance with our decisions in this Order, in time for it to be used for the certifications to be filed in August 2007.

**Primary place of use or billing address**

58. FCC determined it would continue to distribute federal universal service support based on the customer's billing address.<sup>118</sup> KUSF support is also distributed based on the billing address. The Commission requested comment on whether to retain the customer's billing address as the criterion for distributing support.<sup>119</sup>

59. SIA and ITG suggested it is contrary to the public interest and not competitively neutral for a wireless carrier to receive support for customers who cannot use their phone in the area of their billing address.<sup>120</sup> They recommended that competitive ETCs be required to certify annually that all support they receive is paid for active accounts on which service is actually provided and that the time period for the service and the support coincide.<sup>121</sup> Staff commented it believed all states use billing address as the determinant for distribution of universal service support.<sup>122</sup>

60. ALLTEL and Cingular objected to use of billing address to determine assessments for the KUSF. They argued the Commission should adopt the customer's place of primary use for assessment purposes. Cingular argued the use of billing address for assessment purposes is burdensome for wireless carriers and noted that the Mobile Telecommunications Sourcing Act for taxes and fees relies on the customer's primary

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<sup>118</sup> FCC Order, ¶ 82.

<sup>119</sup> Order Opening Docket, ¶ 20.

<sup>120</sup> SIA and ITG Comments, ¶ 22.

<sup>121</sup> Id. at ¶ 23.

<sup>122</sup> Staff Reply Comments, ¶ 181.

place of use.<sup>123</sup> ALLTEL and Cingular did not comment on use of billing address for distribution of support. ALLTEL and Staff recommended the Commission open a generic investigation into the use of primary place of use as the basis for KUSF assessments.<sup>124</sup>

61. The Commission finds it appropriate to continue to distribute KUSF support based on the customer's billing address. Support payments are targeted to high cost areas and distributing support based on any other basis might invite gaming of the system to maximize support regardless of location of the customer.

62. With respect to what criterion to use for assessment of KUSF support, a group of wireless carriers filed a petition requesting the Commission open a generic docket to consider whether to adopt primary place of use as the basis for assessing wireless carriers for contributions to the KUSF. The Commission issued an order in Docket No. 06-GIMT-943-GIT (06-943 docket) requesting comment on that issue on March 31, 2006. Comments and Reply Comments were filed. On July 6, 2006, the Commission issued an order in that docket requesting the filing of additional comments by July 28, 2006. The Commission issued an Order on September 7, 2006, authorizing the use of primary place of use for assessing wireless carriers for KUSF contributions from March 1, 2006 forward.

### **Lifeline**

63. The Commission requested Comment on whether ETCs should be allowed to limit their Lifeline discount offerings.<sup>125</sup>

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<sup>123</sup> ALLTEL Comments, ¶ 32, Cingular Comments, pp. 1-5.

<sup>124</sup> ALLTEL Comments, ¶ 32, Staff Reply Comments, ¶ 35.

<sup>125</sup> Order Opening Docket, ¶ 21.

64. Staff, CURB, SIA and ITG argued that all local service plans should be made available to Lifeline customers with the appropriate discount applied.<sup>126</sup> RCC and USCOC stated they allow Lifeline customers to select any rate plan and apply the discount to whatever price plan the customer selects.<sup>127</sup>

65. ALLTEL argued the Commission should not require ETCs to allow customers to choose any rate plan, but should allow a company to offer only its lowest priced service as a Lifeline plan. ALLTEL explains that it offers the same Lifeline plan in all the states in which it is an ETC and that customers derive benefit from ALLTEL's lifeline offering because ALLTEL discounts its lowest cost plan by more than the support amount it receives from the universal service fund. ALLTEL also asserts that a state-specific requirement "would be very expensive for national carriers to implement."<sup>128</sup> ALLTEL interprets 47 C.F.R. § 54.403(b) to support its argument and argues that because the FCC's rule mentions "the lowest tariffed residential rate," its practice of only allowing Lifeline customers to subscribe to its lowest tariffed service is in compliance with the rule.<sup>129</sup> The relevant language is as follows:

Other eligible telecommunications carriers shall apply the Tier-One federal Lifeline support amount, plus any additional support amount to reduce their lowest tariffed (or otherwise generally available) residential rate for the services ..., and charge Lifeline customers the resulting amount.

Staff disagrees with ALLTEL's interpretation of the FCC's language, observing that ALLTEL ignores the parenthetical language "or otherwise generally available." Staff argues it is discriminatory to limit Lifeline customers to only one plan when other

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<sup>126</sup> Staff Comments, ¶ 39, CURB Comments, ¶ 42, SIA and ITG Comments, ¶ 25.

<sup>127</sup> RCC and USCOC Comments, ¶ 52.

<sup>128</sup> ALLTEL Reply Comments, ¶ 16.

<sup>129</sup> ALLTEL Comments, ¶¶ 40-41.

customers may select the plan that suits their calling patterns best. Staff observed the Commission has a complaint pending against ALLTEL in Docket No. 06-ALKT-558-COM for denying the customer the plan the customer believes she needs.<sup>130</sup> Staff also referenced the FCC's website, which describes Lifeline as a "telephone discount program [that] gives people with low incomes a discount on basic monthly service for the phone at their principal place of residence." Staff argued the FCC provides no indication that the Lifeline program is limited to the lowest price plan.<sup>131</sup> Staff's Report recommended that the Commission require all ETCs to allow Lifeline customers to select their calling plan and have the discount applied to their plan of choice.<sup>132</sup>

66. *The Commission agrees with Staff's interpretation of the federal rule.* ALLTEL is putting too limited an interpretation on the FCC's language which requires ignoring the parenthetical language. The Commission observes that the purpose of Lifeline is to make telephone service affordable to all customers to realize the goal of universal service. 47 U.S.C. § 254(c) defines universal service as "an evolving level of telecommunications services" that "are essential to education, public health, or public safety; have through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers; are being deployed in public telecommunications networks ...." It seems to the Commission that limiting Lifeline customers to the lowest cost plan that an ETC has available is contrary to the goals for universal service. The Commission also observes that the FCC, and this Commission, at one time considered providing universal service support only to a primary line for each household, reasoning that one line would assure access to the network. FCC dropped its

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<sup>130</sup> Staff Reply Comments, ¶ 39.

<sup>131</sup> Staff Comments, ¶ 39.

<sup>132</sup> Report, p. 37.

consideration of this issue because of pressure from Congress making it clear that all lines should be supported. This seems to be an expression of intent that customers should have choices and that universal service programs, including Lifeline should support customer choice. The Commission finds that all ETCs shall allow Lifeline customers to select a plan and apply the discount to that plan.

#### **Current Commission Competitive ETC requirements**

67. The Commission requested comment on whether to continue the requirements placed on RCC and ALLTEL in their respective dockets and if so whether they should be extended to all ETCs. The Commission has already addressed the mapping requirement in ¶¶ 29 and 56. The Commission also required those companies to report each quarter the number of times they refused to serve a customer, including the customer's location and reason for refusing to serve, as well as progress in reaching interconnection agreements for resale to meet demand the ETC cannot serve through its own facilities. The Commission also required RCC and ALLTEL to include an explanation of the ETC's obligations and how to contact the Commission for complaints in advertising.<sup>133</sup> Finally RCC and ALLTEL had to agree to comply with the CTIA Code for wireless service and report complaints per 1,000 handsets annually.<sup>134</sup> Staff recommended the Commission continue these requirements and extend them to all ETCs.

68. The Commission finds the requirements it adopted in the RCC and ALLTEL dockets assist it in its duties. Although ALLTEL opposes the requirement to file a quarterly report on refusals to serve, this is not a burdensome requirement. The FCC requirements, which the Commission adopted in ¶ 56, require reporting this

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<sup>133</sup> RCC Order, ¶ 23; ALLTEL Order, ¶ 27.

<sup>134</sup> RCC Order, ¶ 42; ALLTEL Order, ¶ 42.

information in the annual certification for FCC designated ETCs. By receiving reports on a quarterly basis, the Commission will be in a better position to assist customers by reviewing company maps and projected availability of service. Reporting refusals to serve on a quarterly basis cannot be considered burdensome. The Commission continues the requirement to report refusals to serve on the first business day of January, April, June and September for companies already subject to it and makes it applicable to all other wireless ETCs.

**KUSF support for service provided by use of unbundled network elements**

69. SWBT, Sage Telecom Inc. (Sage) and Staff stipulated that Sage would receive KUSF support equal to the amount per line that the incumbent received or the cost of the UNE, whichever was lowest, in Docket No. 03-SAGT-867-ETC (03-867 docket). The Commission approved the Stipulation. In Docket No. 06-NTHT-027-KSF, the Commission adopted the same method for Nex-Tech. In its comments SWBT urged the Commission to open a generic proceeding to address the issue of appropriate KUSF support for an ETC providing service through UNEs, as recommended by the parties in the 03-867 docket.<sup>135</sup> Staff observed the Commission has addressed the issue in the Nex-Tech docket, but suggested the Commission open a generic investigation to determine the amount of support that should be payable to UNE providers and whether carriers that provide universal service based on commercial agreements qualify for ETC designation.

70. The Commission agrees with SWBT and Staff and notes that it has already opened Docket No. 06-GIMT-1277-GIT to address KUSF support for ETCs using UNEs and for ETCs providing service based on a commercial agreement.

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<sup>135</sup> SWBT Comments, ¶ 19.



### **Determination of Support paid to ETCs.**

71. Based on the Kansas Telecommunications Act and the Federal Telecommunications Act, the Commission determined that ETCs should receive the same amount of KUSF support per line as the incumbent.<sup>136</sup> The Commission did not request comment on this issue, but CURB suggested in its Comments that support in rural telephone company service areas should be based on incremental cost, if,

- the incumbent carrier is no longer rate of return regulated;
- the incumbent owns or has common ownership interest in an ETC or another entity that serves the same geographic area as the incumbent; or
- the incumbent receives a bona fide request for interconnection, services or network elements and the Commission determines that the request is not unduly burdensome, is technically feasible, and is otherwise consistent with 47 U.S.C. § 254.<sup>137</sup>

72. In its Reply Comments, Nex-Tech recommended the Commission not adopt CURB's proposal. Nex-Tech argued it is inconsistent with state and federal law and it would be premature to adopt this recommendation in this docket, considering that there are proceedings affecting this issue at the FCC and this Commission. Nex-Tech noted a recent decision of the Court of Appeals upheld the Commission's distribution of support based on a rate of return regulated company's embedded costs. Nex-Tech also noted the Court determined that a rate of return regulated company's KUSF support cannot be adjusted without a review of the company's embedded cost.<sup>138</sup>

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<sup>136</sup> In the Matter of an Investigation Into the Kansas Universal Service Fund (KUSF) Mechanism for the Purpose of Modifying the KUSF and Establishing a Cost-Based Fund. Docket No. 99-GIMT-326-GIT, *Order Affirming Portability of KUSF*. October 12, 2001.

<sup>137</sup> CURB Comments, ¶ 37.

<sup>138</sup> *Bluestem Telephone Co. et al. v. Kansas Corporation Commission*, 33 Kan. App. 2d 817 (2005).

73. Staff also recommended against adoption of CURB's proposal. Staff expressed concern that different support levels for the incumbent and the competitive ETC might not be competitively neutral and also noted that K.S.A. 66-2008(e) requires that KUSF support to rate of return regulated companies be based on embedded cost. Staff also observed that all rural local exchange companies have elected to remain rate of return regulated.<sup>139</sup>

74. K.S.A. 66-2008(e) requires that KUSF support for rate of return regulated companies such as the rural local exchange companies be based on embedded cost.<sup>140</sup> Thus, adoption of an alternate cost methodology based on two of the criteria suggested by CURB would violate that statutory requirement. With respect to CURB's first criterion, the Commission notes that all rural local exchange companies have elected to remain rate of return regulated, thus it would be pointless at this time to adopt an alternative cost methodology to determine KUSF support in the abstract. If any of these companies at some time in the future decide to elect to be price cap regulated the Commission can determine the appropriate cost methodology at that time.

#### **Summary of decisions**

75. The Commission requires all ETCs, unless otherwise indicated, to certify the following to the Commission in filings made in August each year, starting in August 2007, to enable the Commission to certify compliance with ETC requirements to the FCC:

- a. Competitive ETCs shall file two-year service quality improvement plans demonstrating progress, including map and if targets were not met, an explanation of why.

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<sup>139</sup> Staff Report, p. 39.

<sup>140</sup> *Bluestem Telephone Company, et al., v. Kansas Corporation Commission*, 33 Kan. App. 2d 817 (2005).

- b. Detailed information on outages lasting more than 30 minutes that potentially affect at least 10 percent of customers or that could affect 911. The ETC must report: date and time of outage, description and resolution, affected services, affected geographic areas, steps taken to prevent recurrence and number of customers affected.
- c. Number of complaints per 1000 handsets.
- d. Compliance with the Commission quality of service standards by wireline ETCs and with the CTIA Code by wireless ETCs.
- e. Ability to function in an emergency.
- f. Offering of a local usage plan comparable to that of the ILECs.
- g. Media in which the ETC has placed advertisements, specifying geographic areas reached and dates published.

76. The Commission further requires all competitive ETCs to report the number of instances they have refused to provide service to a customer in response to a reasonable request quarterly on the first of January, April, June and September. The report shall include location of the customer, an explanation why none of the options in the six-step process could be used to serve the customer and progress in establishing interconnection arrangements to serve the customer through resale. This Order adopts a definition of "reasonable request." ¶¶ 27, 29. Competitive ETCs that have not already provided maps must do so in 90 days from the date of this Order. Wireline ETCs shall file maps as required by K.A.R. 82-12-7(b).

77. This Order also establishes additional requirements for ETCs to ensure that customers receive "universal service." They are:

- a. Competitive ETCs must include language in all their advertising in their Kansas ETC areas explaining their obligation to provide universal service. They shall work with Staff to arrive at satisfactory language. Competitive ETCs that have not yet developed appropriate advertising language shall do so within 90 days of the date of this Order.

- b. Competitive ETC advertising must include information on how customers can contact the Commission's Office of Public Affairs and Consumer Protection. Competitive ETCs that have not yet developed language setting out this information shall do so within 90 days of the date of this Order.
- c. ETCs that do not offer unlimited local usage must offer free optional per minute blocking of local usage to Lifeline customers. Such blocking must allow 911 calls to be completed. Blocking must be offered within 90 days of this Order.
- d. Wireless ETCs must offer one calling plan without a termination fee, priced as deemed appropriate by the ETC. Certification that such a plan is available shall be filed in this docket within 90 days of this Order.
- e. ETCs are required to allow Lifeline customers to choose a calling plan and to apply the Lifeline discount to the plan selected by the customer. Any ETC that does not allow customer selection at this time must do so within 180 days of the date of this Order.

78. The Commission will consider the following factors, as well as others, in determining whether it is in the public interest to designate an additional ETC in a service area:

- a. Designation of an additional ETC will lead to increased choice of providers for consumers.
- b. When an applicant seeks ETC designation for a smaller service area than that of the incumbent, the Commission will consider a population density analysis. To date the Commission has not considered designation for a smaller area than a wire center.

79. The Commission has not adopted the following recommendations of parties to this docket:

- a. The Commission has not established a minimum local usage requirement but will address it on a case-specific basis based on the evidence.
- b. Wireless ETCs are not required to provide equal access nor acknowledge that they may need to be required to do so at some indefinite future time.

- c. In considering the public interest of designating an additional ETC, the Commission will not limit ETC designation based on the amount of support per line or the effect on the carrier of last resort.

The Commission also notes that KUSF support will continue to be distributed based on the customer's billing address and that the KUSF assessment for wireless carriers shall be made based on the PPU, as determined in the 06-943 docket. Further, the Commission will decide applicability of billing practices standards in the 06-187 docket and distribution of KUSF support to ETCs that provide service using UNEs and commercial agreements in the 06-GIMT-1277-GIT docket. The Commission is not adopting CURB's alternate cost methodology recommendation. Finally, the Commission directs Staff to develop new ETC certification report forms within 6 months of the date of this Order and to provide them to all ETCs for comment, so that the new forms can be used for the certifications to be submitted in August 2007.

**IT IS, THEREFORE, BY THE COMMISSION ORDERED THAT:**

- A. The requirements adopted in this order shall apply to ETC designations and certifications in the manner set out above.
- B. Staff is directed to develop a new form for ETC certification to incorporate the decisions set out in this order.
- C. The parties have fifteen days, plus three days if service of this order is by mail, from the date this order was mailed in which to petition the Commission for reconsideration of any issue or issues decided herein. K.S.A. 66-118; K.S.A. 2005 Supp. 77-529(a)(1).
- D. The Commission retains jurisdiction over the subject matter and the parties for the purpose of entering such further order, or orders, as it may deem necessary.

BY THE COMMISSION IT IS SO ORDERED.

Moline, Chr.; Krehbiel, Com.; Moffet, Com.

Dated: OCT 02 2006

ORDER MAILED

OCT 02 2006

 Executive  
Director

Susan K. Duffy  
Executive Director

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**ATTACHMENT 2**

**BEFORE THE STATE CORPORATION COMMISSION  
OF THE STATE OF KANSAS**

STATE CORPORATION COMMISSION

Before Commissioners:

Brian J. Moline, Chair  
Robert E. Krehbiel  
Michael C. Moffet

OCT 19 2006

In the Matter of a General Investigation )  
Addressing Requirements for Designation )  
of Eligible Telecommunications Carriers )

Docket No. 06-GIMT-446-GIT

*Susan K. Duffy* Docket  
Room

**SPRINT NEXTEL CORPORATION  
PETITION FOR RECONSIDERATION AND HEARING**

**I. INTRODUCTION**

1. Sprint Nextel Corporation ("Sprint Nextel"), through counsel and pursuant to K.S.A. §§ 66-118b and 77-529, K.A.R. § 82-1-235 and applicable statutes and regulations, respectfully submits this Petition for Reconsideration and Hearing of the "Order Adopting Requirements for Designation of Eligible Telecommunications Carriers" issued October 2, 2006 ("*ETC Order*"). For the reasons set forth below, the Kansas Corporation Commission ("Commission") should reconsider certain issues of fact and law set forth in the *ETC Order*. Specifically, Sprint Nextel requests that the Commission reconsider adoption of the following requirements:

(a) That competitive eligible telecommunications carriers ("ETCs") include language in all their advertising in their Kansas ETC areas explaining their obligation to provide universal service and include information on how customers can contact the Commission's Office of Public Affairs and Consumer Protection. *ETC Order*, ¶¶ 12-13, 77(a)-(b).

(b) That ETCs that do not provide unlimited local usage must offer free per minute blocking of local usage to Lifeline customers within 90 days. *ETC Order*, ¶¶ 16, 77(c).



(c) That wireless ETCs must offer at least one calling plan without a termination fee. *ETC Order*, ¶¶ 33, 77(d).

(d) That all ETCs must allow Lifeline customers to choose a calling plan and apply the Lifeline discount to the plan selected by the customer. *ETC Order*, ¶¶ 66, 77(e).

2. For the reasons set forth below, the Commission's adoption of the foregoing requirements is unsupported by the record evidence, arbitrary and capricious, contrary to law and exceeds the Commission's jurisdiction and authority.

3. Sprint Nextel requests a hearing on the issues of fact and law set forth above.

**II. THE ETC ORDER'S COMPETITIVE ETC ADVERTISING REQUIREMENTS ARE CONTRARY TO STATE AND FEDERAL LAW**

4. Under the new requirements set forth in the Commission's *ETC Order*, competitive ETCs will be required to (1) include language regarding their "universal service obligation" in all of their advertisements in their Kansas ETC areas; (2) include the contact information for the Office of Public Affairs and Consumer Protection in their advertisements; (3) annually certify and report the media in which advertisements have been placed, geographic areas reached and dates published; and (4) include information about at least one rate plan that does not include a termination fee in their advertisements. *ETC Order*, ¶¶ 12-13, 33. Incumbent ETCs are exempt from these requirements.

5. The foregoing competitive ETC advertising requirements are contrary to state and federal law. The Commission should, therefore, reconsider the adoption of such rules and amend its *ETC Order* to omit the requirements.

A. The Competitive ETC Advertising Requirements Violate K.S.A. § 66-1,143(b)

1. **The Commission Is Prohibited From Regulating Wireless Carriers**

6. As a threshold matter, the Commission is without jurisdiction or authority to regulate or direct the form or content of a wireless carrier's advertising materials. Kansas law exempts wireless carriers from all forms of Commission regulation, and the state statutes do not provide any exception for wireless carriers that are designated as ETCs for purposes of receiving federal universal service support.

7. K.S.A. § 66-104a(c) provides as follows:

The service of a telephone public utility, otherwise authorized to transact business pursuant to K.S.A. 66-131 and amendments thereto, relating to the provision of radio communication, including cellular radio, which is one-way, two-way or multiple, between mobile and base stations, between mobile and land stations, including land line telephones, between mobile stations or between land stations, shall not be subject to the jurisdiction, regulation, supervision, and control of the state corporation commission. (Emphasis added).

Similarly, K.S.A. § 66-1,143(b) provides that "no radio common carrier shall be subject to the jurisdiction, regulation, supervision and control of the state corporation commission." Shortly after the enactment of the Kansas Telecommunications Act, the Commission confirmed that "wireless providers are statutorily exempt from Commission jurisdiction" as a result of these statutes.<sup>1</sup>

8. The Kansas Supreme Court has similarly interpreted K.S.A. § 66-1,143(b) as prohibiting the Commission from asserting any jurisdiction, supervision or control over wireless carriers. In *CURB v. Kansas Corporation Commission, et al.*, 264 Kan. 363 (1998), the court broadly construed the statute's application as follows:

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<sup>1</sup> *In the Matter of a General Investigation Into Competition Within the Telecommunications Industry in the State of Kansas*, Docket No. 190,492-U 94-GIMT-478-GIT, Order, ¶ 97 (Dec. 27, 1996).

From a straightforward reading of K.S.A. §66-1,143(b), it prohibits the KCC from exercising any jurisdiction, regulation, supervision, or control over radio common carriers. K.S.A. §66-1,143(b) does not merely prohibit the regulation of rates or market entry over radio common carriers, as 47 U.S.C. § 332(c) does. K.S.A. §66-1,143(b) imposes a broader prohibition on the KCC's regulation of radio common carriers than 47 U.S.C. §332(c) imposes on a state's regulation of radio common carriers. In comparing the language of the two statutes, K.S.A. §66-1,143(b) uses much broader language than 47 U.S.C. §332(c) and should be interpreted as such.

*Id.* at 392 (emphasis in original).

9. The competitive ETC advertising requirements set forth in the *ETC Order* clearly fall within K.S.A. § 66-1,143(b)'s prohibition against the regulation, supervision or control of wireless carriers. *See CURB*, 264 Kan. at 392. The rules would regulate not only the form and content of marketing materials used by wireless carriers to promote their services, but would also require a wireless ETC to annually certify compliance with the advertising requirements and report detailed information about the carrier's advertising efforts. As a result, the Commission should reconsider adoption of the advertising requirements as it is without jurisdiction to enforce the rules against wireless carriers.

**2. Nothing In The ETC Designation Process Supersedes The State Law Prohibition Against Commission Regulation Of Wireless Carriers**

10. Although the Commission acknowledges the limitations imposed by K.S.A. § 66-1,143(b), it suggests the statute does not apply in this case because “[w]ireless carriers that seek ETC designation for the purpose of receiving [federal] universal service support submit themselves to the Commission’s jurisdiction and assent to the imposition of certain conditions for the purpose of receiving that designation.” *ETC Order*, ¶ 33. Sprint Nextel respectfully disagrees. To the contrary, nothing in the ETC designation process grants to the Commission greater jurisdiction or authority than was granted by the Kansas Legislature. The Commission is a creature of statute and must act within the confines of its enabling statutes. *See Kansas*

*Industrial Consumers Group, et al. v. KCC*, No. 96,228 -- Kan. App. 2d -- (July 7, 2006) (“[A]dministrative agencies such as the Commission, as creatures of statute, may only act within the scope of authority granted by their authorizing statutes”) (citing *Legislative Coordinating Council v. Stanley*, 264 Kan. 690, 957 P.2d 379 (1998)).

11. Under 47 U.S.C. § 214(e)(2), Congress delegated to state regulatory commissions the primary responsibility for performing ETC designations. To that end, 47 U.S.C. § 254(f) recognizes that a state commission may adopt additional ETC regulations “not inconsistent” with the FCC’s rules and provided such additional requirements are funded by state universal service mechanisms so as not to burden the federal fund:

A State may adopt regulations not inconsistent with the [FCC’s] rules to preserve and advance universal service . . . A State may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms. (Emphasis added).

12. 47 U.S.C. § 254(f) is permissive and does not independently vest the Commission with any authority or jurisdiction over wireless carriers. Rather, the statute merely clarifies that a state does not violate federal law by adopting additional ETC regulations, to the extent such requirements are consistent with federal law and funded with state support. To be sure, 47 U.S.C. § 254(f) does not confer any authority on the states that would preempt an otherwise applicable state statute, like K.S.A. § 66-1,143(b), which expressly prohibits regulation of wireless carriers by the Commission. Accordingly, the Commission may not rely on the erroneous conclusion that wireless carriers somehow submit themselves to the Commission’s regulatory jurisdiction by applying for designation as a federal ETC. A party cannot confer subject matter jurisdiction on an administrative agency by consent or acquiescence. *Kansas Bd. of Regents v. Skinner*, 267 Kan. 808, 814, 987 P.2d 1096 (1999) (“Our rule is clear that parties

cannot confer subject matter jurisdiction by consent, waiver, or estoppel.”). See also *Arcadian Fertilizer, L.P. v. Sarpy County Bd. of Equalization*, 583 N.W.2d 353, 357 (Neb. Ct. App. 1998); *Blackwell v. Commonwealth*, 567 A.2d 630, 636 (Pa. 1989).

**B. The Competitive ETC Advertising Requirements Violate 47 U.S.C. § 254(f)**

**1. The Competitive ETC Advertising Requirements Are Inconsistent With The FCC's Universal Service Rules**

13. As noted above, 47 U.S.C. § 254(f) recognizes that a state commission may adopt additional ETC regulations “not inconsistent” with the FCC’s universal service rules. In this case, the competitive ETC advertising requirements set forth in the *ETC Order* are entirely inconsistent with 47 U.S.C. § 214(e) and 47 C.F.R. § 54.201(d), which similarly provide that a federal ETC’s advertising obligation is limited to:

Advertis[ing] the availability of [the services enumerated in 47 C.F.R. 54.101(a)(1)-(a)(9)] and the charges therefor using media of general distribution.

47 U.S.C. § 214(e)(1)(B) and 47 C.F.R. § 54.201(d)(2).

14. The *ETC Order*’s competitive ETC advertising requirements go far beyond the federal advertising requirement and are entirely unrelated to the federal obligation to advertise the “availability of” and “charges for” the supported services. Indeed, the *ETC Order*’s advertising requirements mandate the advertising of a competitive ETC’s “universal service obligation,” contact information for the Office of Public Affairs and Consumer Protection and information about termination fees. While a competitive ETC’s “universal service obligation” may be related to the “availability of” and “charges for” the supported services, it is entirely unclear because the *ETC Order* fails to define which “universal service obligation” is at issue.<sup>2</sup> In any event, the requirement to advertise contact information for the Office of Public Affairs and Consumer Protection and information about termination fees is clearly unrelated to the

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<sup>2</sup> See Section III, *infra*.

advertising requirement set forth in 47 U.S.C. § 214(e)(1)(B) and 47 C.F.R. § 54.201(d)(2). At no time has the FCC construed the federal advertising requirement as extending beyond the obligation to advertise the availability of and charges for the supported services. Accordingly, the competitive ETC advertising requirements are inconsistent with the FCC's universal service rules and must be rescinded.

## **2. The Competitive ETC Advertising Requirements Are Not Competitively Neutral**

15. The competitive ETC advertising requirements adopted by the Commission are also inconsistent with the FCC's universal service rules because they violate the principle of competitive neutrality. In 1997, the FCC adopted the principle of competitive neutrality as a core principle for its universal service rules.<sup>3</sup> This principle means that universal service rules must not favor one competitor or technology over another. In its March 17, 2005 Order adopting additional requirements for carrier's designated as ETCs under 47 U.S.C. § 214(e)(6), the FCC further cautioned state regulators to first consider the extent to which a particular regulation is necessary to protect consumers, as well as the extent to which it may disadvantage an ETC specifically because it is not the incumbent LEC.<sup>4</sup>

16. Contrary to the universal service principle of competitive neutrality, incumbent ETCs are exempt from the four competitive ETC advertising requirements set forth the *ETC Order*. The sole basis for this exemption is the Commission's finding that "[s]ince incumbent ETCs are required to include such information in their telephone directories their customers have ready access to this information." *ETC Order*, ¶ 13 n. 19. Even if true, the advertising

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<sup>3</sup> *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Report and Order*, FCC 97-157, ¶ 47 (rel. May 8, 1997) ("*Universal Service Order*").

<sup>4</sup> *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket 96-45, *Report and Order*, FCC 05-46, ¶ 30 (rel. March 17, 2005) ("*March 2005 Order*").

requirements imposed on competitive ETCs are far more burdensome and stringent than the obligation to place a notice in the incumbent's telephone directory.<sup>5</sup> Unlike the incumbent ETCs, competitive ETCs will be required to upend their current - and in many cases national - advertising campaigns to specially tailor their advertisements to satisfy the unique requirements of the *ETC Order*. Moreover, the *ETC Order* could be construed such that competitive ETCs will be obligated to include the required notices in every advertisement that may find its way into Kansas, regardless of the media channel used. These highly disparate requirements clearly discriminate against competitive ETCs solely because they are not the incumbent and, therefore, must be rejected as violating the principle of competitive neutrality.

**3. The Competitive ETC Advertising Requirements Constitute An Unfunded Mandate**

17. The Commission should further reconsider adoption of the competitive ETC advertising requirements because compliance with the rules will burden the federal universal service fund in violation of 47 U.S.C. § 254(f). As noted above, 47 U.S.C. § 254(f) provides that a state commission may adopt additional ETC regulatory obligations only to the extent that they are separately funded by state universal service mechanisms and do not burden the federal universal service fund:

A State may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms

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<sup>5</sup> In fact, Sprint Nextel questions whether the Commission can even compare the obligations. It is doubtful whether a local telephone directory qualifies as "media of general distribution" as such directories are generally distributed only to customers of the incumbent ETC. Under federal law, every ETC has the obligation to advertise the availability of the services enumerated in 47 C.F.R. § 54.101(a)(1)-(a)(9) and the charges therefore using "media of general distribution." 47 U.S.C. § 214(e). Because of the limited distribution of local telephone directories, the incumbent ETCs' inclusion of such information in those directories may fail to satisfy the federal advertising obligation in any respect.

to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms. (Emphasis added).<sup>6</sup>

Stated otherwise, the Commission may not adopt additional ETC regulatory obligations without providing a separate support mechanism to defray the cost of compliance.

18. In this case, competitive ETCs will be forced to allocate additional resources to advertising in order to comply with the new advertising requirements. As discussed more thoroughly below, competitive ETCs that conduct regional or national advertising campaigns will have to specially tailor their advertising materials to the state-specific Kansas requirements. The additional costs associated with these efforts may be appropriately compensated through the application of federal universal service support. As a result, compliance with the competitive ETC advertising requirements will necessarily burden the federal universal service fund in violation of 47 U.S.C. § 254(f).

### **III. THE COMPETITIVE ETC ADVERTISING REQUIREMENTS ARE UNREASONABLY VAGUE AND OVERBROAD**

19. In addition to the defects addressed above, the Commission should also reconsider adoption of the competitive ETC advertising requirements because the rules are unreasonably vague and overbroad. First, the *ETC Order* fails to define the form and content of any of the prescribed notices to be included in a competitive ETC's advertisements. For example, the *ETC Order* fails to describe the "universal service obligation" competitive ETCs are required to inform consumers about. Likewise, the *ETC Order* fails to specify what information must be provided concerning a competitive ETC's termination fees. In fact, the *ETC Order* is virtually silent as to what would constitute compliant language other than a general directive to "work

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<sup>6</sup> Consistent with the requirements of 47 U.S.C. § 254(f), the Commission has adopted additional requirements applicable to carriers designated as eligible to receive state support from the Kansas Universal Service Fund ("KUSF"). The KUSF requirements are not at issue in this proceeding.



with Staff to arrive at satisfactory language.” *ETC Order*, ¶ 77. The delegation of such discretion to Staff is arbitrary and capricious. Any rules adopted by this Commission must establish clear and definite standards to be susceptible of general application. As drafted, the competitive ETC advertising requirements are unreasonably vague and, therefore, administratively unenforceable.

20. Likewise, the competitive ETC advertising requirements are overbroad. The rules as adopted would require a competitive ETC to include a notice concerning the carrier’s “universal service obligation,” contact information for the Office of Public Affairs and Consumer Protection and a notice advising consumers about a rate plan that does not include a termination fee in all of the carrier’s advertisements within its designated ETC service area. Although the Commission relies on similar conditions imposed in earlier competitive ETC designation proceedings (*ETC Order*, ¶10), the requirements adopted in the *ETC Order* go far beyond any action the Commission has taken in the past.

21. In each of the prior cases relied on by the Commission, the condition imposed on the competitive ETC was limited to print (*i.e.*, newspaper) advertising. As noted in each of the Orders acknowledging compliance with the Commission’s advertising conditions, the Commission observed that “Staff has reviewed a sample advertisement and the font size and placement is appropriate.”<sup>7</sup> Under the *ETC Order*, however, the advertising requirement does not appear to be limited to print media, but rather applies to all of the ETC’s advertisements.

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<sup>7</sup> See *In the Matter of the Application of ALLTEL Kansas Limited Partnership for Designation as an Eligible Telecommunications Carrier*, Docket No. 04-ALKT-283-ETC, Order (Dec. 21, 2004); *In the Matter of Petition of RCC Minnesota, Inc. for Designation as an Eligible Telecommunications Carrier*, Docket No. 04-RCCT-338-ETC, Order (Dec. 22, 2004); *In the Matter of the Application of H&B Cable Service, Inc. for Designation as an Eligible Telecommunications Carrier*, Docket No. 04-HBCT-1107-ETC, Order (Jan. 26, 2005).